KHARUDIN v. PUBLIC PROSECUTOR

[A.Cr.J. (Syed Othman J.) March 27, 1968]
[Kota Bharu — Criminal Appeal No. 40 of 1967]

Criminal Law and Procedure — Sentence — Whipping — Whether finding of guilt in juvenile court can be registered under the Registration of Criminals Ordinance, 1948 — Juvenile Courts Ordinance, 1947.

Juvenile — "Conviction" and "sentences" in juvenile court — Whether "registrable particulars" for purposes of the Registration of Criminals Ordinance, 1948.

In this case the appellant pleaded guilty to theft of a bicycle and was sentenced to one year's imprisonment and, in addition, to whipping. The appellant it appeared had a number of previous convictions, five of which consisted of "convictions" in the juvenile court.

Held: (1) the antecedents of the offender or the fact that he is a habitual thief cannot be made the sole consideration for inflicting the punishment of whipping. The facts of the case must show circumstances so aggravating as to repulse human conscience and so to merit the punishment of whipping;

(2) a finding of guilty by the juvenile court should not have been registered under the Registration of Criminals Ordinance, 1948 as it is not a conviction;

(3) in this case the circumstances did not justify the court to exercise its discretion of imposing the punishment of whipping and therefore the sentence of whipping must be set aside.

Cases referred to:—

(1) *Lim Soo Hak & Anor.* v. *R.* [1955] M.L.J. 44.

(2) *Mohamed Ali* v. *Public Prosecutor* [1956] M.L.J. 84.

(3) *Ho Kin Luan & Anor.* v. *Public Prosecutor* [1959] M.L.J. 159.

MAGISTRATE'S CRIMINAL APPEAL.

Appellant in person.

Wan Ismail bin Wan Mohamed Salleh (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Syed Othman J.: The appellant in this case pleaded guilty to a charge of theft of a bicycle under section 379 of the Penal Code. The learned magistrate before whom he appeared sentenced him to one year's imprisonment and, in addition, as a deterrent by reason of the fact that he had 13 previous convictions of which 5 were for theft, 3 for house-breaking and theft, 2 for dishonestly receiving or retaining stolen property, 1 for possession of house-breaking implements, 1 for escaping from lawful custody and 1 for failing to report as a police supervisee, the learned magistrate imposed whipping by three strokes of the rattan.

Before proceeding with the appeal, I wish to make some observations on one point which I consider to be important. In the record of convictions against the appellant, 5 consist of "convictions" and "sentences" in the juvenile court. Subsection (3) of section 12 of the Juvenile Courts Ordinance, 1947, reads as follows:—

"The words 'conviction' and 'sentence' shall cease to be used in relation to children and young persons dealt with by the juvenile court and any reference in any written law to a person convicted, a conviction and a sentence shall, in the case of a child or young person, be construed as a finding of guilt or an order made upon such finding as the case may be."

The implications of this provision are very clear. As the words ''conviction" and "sentence" cannot be used in relation to a child or a young person dealt with by the juvenile court, the finding of guilt and an order made by that court, which replace those words, do not fall within the definition of "registrable particulars" for the purpose of the Registration of Criminals Ordinance, 1948. I am therefore of the view that the Central Criminal Registry has not been acting within the requirements of this provision by keeping a record of "convictions" and "sentences" in respect of offences committed by the appellant when he was a child or young person. The juvenile court itself could not at law have convicted him or passed sentence on him for any offence. On this point I need only draw attention to the case of *Lim Soo Hak & Anor.* v. *R.*[1] in which Spenser Wilkinson J. held to the effect that a 'conviction" by the juvenile court was irregular. By keeping a record of "convictions" and "sentences" against such a person the Central Criminal Registry has defeated the very purpose for which the Juvenile Courts Ordinance, 1947, was enacted, which in the main is to protect a juvenile offender from being dealt with like an ordinary criminal. The "convictions" and "sentences" recorded against appellant in respect of offences dealt with by the juvenile court should therefore be expunged from the records of the Central Criminal Registry.

Coming to this appeal, under section 379 of the Penal Code whoever commits a second or subsequent offence of theft shall be liable to imprisonment or to a fine or to whipping or to any two of such punishments. As a matter of general principle, the appellate court is reluctant to interfere with the discretion of the court below in imposing a sentence which is in accordance with the law. Buhagiar J. in *Mohamed Ali* v. *Public Prosecutor*[2] said that except in very bad cases, the punishment of whipping should be reserved for crimes of violence. In the case of *Ho Kin Luan & Anor.* v. *Public Prosecutor*,[3] Thomson C.J. (as he then was) when delivering judgment of the Court of Appeal observed as follows:—

"Whilst, therefore, we adhere to the view already expressed in these courts on various occasions and whilst in principle we deprecate the use of corporal punishment except in cases involving violence or brutality, we acknowledge — as, indeed we must — the fact that there may be cases which justify the courts exercising the discretion, undoubtedly vested in them, of imposing a sentence of corporal punishment even though no actual violence or brutality may have been used. We emphasise, however, that even in such cases the court should consider long and anxiously before it exercises such a discretion. Each case, of necessity, must depend

upon its own facts and upon the character and antecedents of the offender."

The effect of the observation as far as I can see is that the court must ponder very seriously and be extremely hesitant before imposing corporal punishment in cases not involving violence or brutality. The court must consider not only the facts of each case but also the character and antecedents of the offender. In this appeal the antecedents of the appellant with his record of previous convictions are very much against him. But the antecedents of the offender or the fact that he is a habitual thief cannot be made the sole consideration for inflicting the punishment of whipping. The facts of the case against him should also be considered. In my opinion facts envisaged by the above quoted case must be such as to show circumstances so aggravating as to repulse human conscience. In the case here the facts merely showed that the police arrested the appellant while he was riding a bicycle which the complainant had reported four days earlier to have been stolen from him. I can see nothing in these facts which justify the court to exercise its discretion of imposing the punishment of whipping.

I therefore alter the order of the learned magistrate and set aside the sentence as regards whipping.

Order accordingly.

NG MOH v. TAN BOK KIM & ANOR.

[F.C. (Azmi C.J. (Malaya), Pike C.J. (Borneo) & MacIntyre F.J.) August 27, 1968]

[K.L. — Federal Court Civil Appeal No. X 92 of 1967]

Limitation — Claim for recovery of possession of land — Defence pleading limitation — Accrual of cause of action — Limitation Ordinance, 1953.

Land — Claim for recovery of — Limitation — Accrual of cause of action.

The respondents brought an action for the recovery of possession from the appellant of a piece of land in Kuala Lumpur of which they were registered as proprietors. They alleged that the appellant was in unlawful occupation of the land in question and had built houses thereon without their knowledge and consent. The appellant denied that he was in unlawful occupation and alleged that he was in possession under a sale agreement dated December 30, 1950 between himself and one *L* as administratrix and counterclaimed for specific performance.

The learned trial judge held that the counterclaim was barred by limitation in that 12 years had elapsed between the date of the agreement and the date of the counterclaim, (September 16, 1965).

Held, allowing the appeal: the cause of action accrued on *L's* failure to take the necessary action under clause 2 of the agreement after the lapse of 14 days from the date of a letter Exhibit D.8 and not from the date of the agreement. The failure to initiate the necessary action was the first clear unequivocal threat to infringe the appellant's right. In the circumstances the appellant's counterclaim filed on September 16, 1965 was within time.

Case referred to:—

(1) *Bolo* v. *Koklan & Ors.* L.R. 57 I.A. 325; A.I.R. 1930 P.C. 270.

FEDERAL COURT.

V. Oorjitham for the appellant.

T.C. Tang for the respondents.

Cur. Adv. Vult.

Azmi C.J. (Malaya): This is an appeal against the judgment of the High Court at Kuala Lumpur in which the appellant was the defendant. The respondents as the plaintiffs claimed for the return of a certain piece of land from the appellant on the ground that the land belonged to the estate of Tan Pung Chong deceased and that they were the administrators *de bonis non.*

The appellant counterclaimed that the land had been sold to him by Lim Pheng, the previous administratrix of the said estate, under an agreement dated 30th December 1950, Exhibit D.5, signed by them and prayed for specific performance of the agreement.

The land at the time of the agreement was an undivided 80/409th share in Lot No. 3683 in the Mukim of Batu, Kuala Lumpur and subsequently on 31st December 1965 after partition became an entry in the Mukim register No. 6713 for lot 4719. Under the agreement Lim Pheng as administratrix of the said estate agreed to sell the said land to the appellant for $3,600 of which $2,600 was paid immediately and the balance of $1,000 was to be paid on the effectual transfer of the land to the appellant or his nominee. The agreement also provided that Lim Pheng should proceed to apply to the court to cause a valid document of transfer to be executed in favour of the appellant or his nominee and that the appellant should be given immediate possession and it gave him discretion to erect any building on the land and occupy it.

According to the appellant, he went into possession and erected several houses on it, but during the state of emergency subsisting in the State he was ordered by the authorities to remove from that land and the buildings thereon.

The appellant wrote through his solicitor on 15th April 1955 to Lim Pheng requesting her to immediately carry out her part of the bargain namely to obtain an order of the court for the transfer of the said land to him. There was no reply to that letter. Again on 31st March 1964 the appellant through his solicitor wrote to one Tan Boon Seng requesting to know when the sale transaction could be completed. Tan Boon Seng is apparently a son of both Lim Pheng and the deceased and was a witness to the agree-